Returning to the Practices of Our Ancestors? Reconsidering Indigenous Justice and the Emergence of Restorative Practices

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Abstract

Restorative practices have often been considered both as emerging from the customs of Indigenous peoples, and ways of responding to crime that might be most suitable for Indigenous individuals and communities. This paper, which consists of two parts, will reconsider these claims from a critical perspective. The first part of the paper draws on my Ph.D. research on the emergence of restorative justice in Western criminal justice systems. It will argue that although many advocates of restorative justice uncritically and unproblematically accept that restorative practices emerged from the customs of Indigenous peoples, the relationship between Indigenous justice customs and the emergence of restorative justice is much more nuanced than proponents imply. The paper will examine, therefore, the legitimating rationalities associated with the diverse historical 'truths' obscured in advocates' accounts of the role of Indigenous customs and the emergence of restorative justice. The second section draws on the findings of recent research undertaken at the Australian Institute of Criminology, and will present data on the numbers of Indigenous juveniles who participate in restorative conferences in each jurisdiction. These data will be used to elucidate the disparity between the rhetoric or 'promise' of restorative justice, and its apparent impact in relation to Indigenous juveniles. This paper will conclude with a consideration of the continued relevance of restorative justice for Indigenous young people in Australia.

Introduction

It is widely accepted in the literature on restorative justice that restorative practices emerged from a variety of indigenous methods for dealing with deviant behaviour. This claim is repeated frequently, and often unproblematically, in the restorative justice literature. Examples abound, and anyone with a passing knowledge of the restorative justice literature will be familiar with claims such as Mark Carey's (2000:32) that:

> Restorative justice is not a new concept. In fact, it is centuries old, as principles such as requiring restitution for property offenses can be found in the Code of Lipit-Ishtar in 1875 BC, the Code of Hammurabi in 1700 BC, and in the Old Testament and Hebrew Scriptures….indigenous populations in Native America, New Zealand, Australia, and Japan have long carried out restorative practices.

The frequent reiteration of this sentiment in the restorative justice literature has resulted in it acquiring the status of a seemingly incontestable, taken-for-granted "truth", which advocates refer to frequently in their accounts of the emergence of restorative practices (Arzdorf-Schubbe 2000:1; Carey 2000:32; Griffiths & Bazemore 1999:262; Leung 1999:paras 1,21; Llewellyn & Howse 1998:para 7; Masters 1997:240; McCold 1997:i; McElrea 1994:41-43; McLaughlin et al 2003:2; New Zealand Department for Courts 2002:15; New Zealand Department for Courts nd:18; Roach 2000:256; Sherman 2003:11; Strang

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2000:24; Umbreit 2001:xxix; Umbreit et al 2003:385; Weitekamp 1999:93; Zehr 1990:257). Even the United Nations Economic and Social Council (2002:4) declares unproblematically in its *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* that restorative practices 'often draw upon traditional and indigenous forms of justice'.

The 'truth' claim that restorative justice processes have grown out of Indigenous customs gives restorative practices a great deal of legitimacy, as a number of scholars in this area have recognised (Blagg 1997, 1998, 2001, 2002; Bottoms 2003; Cunneen 1997, 2002, 2004; Daly 1996, 2000, 2002, 2004). These authors problematise these claims by arguing that there is much dissatisfaction among various indigenous communities in regards to the introduction of restorative justice (Blagg 1998; Cunneen 1997; Tauri 1999), and that advocates of restorative processes have made 'selective and ahistorical claims…about indigenous social control conforming with the principles of restorative justice, while conveniently ignoring others' (Cunneen 2002:43; see also Daly 2002; Sylvester 2003). Indeed, some proponents' portrayals of indigenous approaches to crime, which highlight the restorative elements of these cultures while omitting their retributive aspects, are 'now legend' (Cunneen 2002:43).

This article, which draws on my doctoral research on the history of restorative justice in the West (see Richards under revision, 2007, 2006, 2005a, 2005b), revisits this issue. It aims to further destabilise the taken-for-grantedness of advocates' claims that restorative justice has emerged out of indigenous justice practices, and to augment critics' assertions in relation to these claims. It will make three main arguments in this regard. Firstly, it will argue that advocates' claims obscure multiple "truth" claims about restorative justice that are rarely disentangled, and that these subtle variations obscure powerful differences in what is being claimed as the history of restorative justice. Secondly, this article argues that the limited sociopolitical authority of indigenous populations hinders the potential of these groups to affect change in the manner often described by restorative justice proponents. Thirdly, this article will consider attempts to render restorative practices culturally appropriate for indigenous communities. These attempts, it will argue, inadvertently reveal that restorative justice practices were often not developed from existing indigenous customs.

This issue is important to address for a number of reasons. Firstly, the claim that restorative justice practices are "indigenous" acts to legitimate restorative practices and to normalise or naturalise their acceptance into the contemporary criminal justice landscape. Restorative justice practices were, to some extent at least, initially promoted by advocates of restorative justice as "indigenous" practices. Governments that supported the development of restorative justice programs often did so based partly on the understanding that "indigenous" restorative justice represented an appropriate and constructive manner with which to respond to indigenous offenders.

If such practices are not genuinely based on indigenous traditions, however, restorative justice practices may fail to achieve the intended outcome of restorative practices, and may not reduce indigenous young people's contact with the criminal justice system.

Disentangling "truth" claims about the indigenous roots of restorative justice

As outlined above, proponents of restorative justice frequently claim that restorative justice measures have their roots in the customs of a range of indigenous peoples, including the indigenous peoples of Australia and New Zealand. It appears that this particular "origin myth" (Daly 2002) or "foundational myth" (Bottoms 2003) obscures multiple "truth" claims that are rarely disentangled. A statement such as Zehr's (2002:11-12) that restorative justice 'owes a great deal to…a variety of cultural and religious traditions….The precedents and roots of restorative justice….are as old as human history' – the likes of which are made consistently, and accepted as unproblematic and uncontested by supporters of restorative justice – masks numerous diverse versions of events. Authors in this field suggest wildly different histories of restorative justice with only subtle variations of this claim. Restorative justice is variously portrayed, for example, as being "consistent with" indigenous customs (Carey 2000:32; Umbreit 2001:xxix), being "based on" or "underpinned by" indigenous customs (La Prairie 1995:79; Leung 1999:para 1; Strang 2000:24), "arising out of", "being fed by", "owing a debt to" or being "embedded in" indigenous traditions (Llewellyn & Howse 1998:para 8; McElrea 1994:41; Zehr 2002:11), and/or having been "established by" indigenous communities (Leung 1999:para 21).

These subtle variations obscure powerful differences in what exactly is being claimed as the history of restorative justice. Much of the language used in relating this particular historical "truth" claim is vague: what does it mean to say that restorative justice is "fed by" or "embedded in" indigenous customs, for example? More significantly, being "consistent with" indigenous customs and "established by" indigenous people are two widely differing claims. To say that restorative justice is *consistent* with indigenous traditions might merely imply that it does not contradict values held by indigenous peoples. (Although this in itself is highly contentious, as it assumes that the same values are universal among aboriginal populations). To say that restorative justice programs have been *established* by indigenous communities perhaps represents the opposite end of this continuum of claims. This suggests that some indigenous communities have both knowledge of, and access to, their cultural traditions in responding to wrongdoing, and the sociopolitical authority to legitimately implement such programs. These two versions of events imply quite different contexts: one in which it is acceptable for governments to introduce programs that are seen to be consistent with the customs of specific indigenous communities, and another in which it is possible and acceptable for indigenous communities to implement traditional practices in a transparent and legitimated fashion.

Additionally, these accounts often state that restorative practices have "pre-modern" and/or "indigenous" roots, with little recognition of the entirely different sociopolitical and historical contexts that these imply (see Carey 2000; Weitekamp 1999). Weitekamp (1999:93), for example, discusses restorative justice in a range of indigenous populations and early Western cultures, before declaring his support for a return to the "ancient" practices of "our ancestors". Calls to return to "our" past approaches to criminal justice, and calls to return to indigenous customs, however, suggest varying legitimating rationalities, and different, perhaps competing, contexts.

A potent example of this can be found in advocates' claims that restorative justice practices have indigenous roots and are simultaneously compatible with world religions. Braithwaite (1996:328; Braithwaite & Braithwaite 2001:24), Leung (1999: para 1, Conclusion section para 1), Carey (2000:32), Umbreit (2001:xxix; Umbreit et al 2003:385), van Wormer (2004:104), Zehr (2002:11, 62), and even the New Zealand Department for Courts (2002:18), all claim either that restorative justice is "consistent with"

both indigenous practices and a range of religious traditions, or that restorative justice has "emerged from" both indigenous and religious roots. Proponents' casual grouping together of these historical claims masks their contentious nature. For some, these accounts would undoubtedly represent something of a contradiction in terms: how can any restorative practice purport to have both indigenous and traditional religious antecedents? If family group conferencing, for example, was a traditional custom practised by Maori prior to the colonisation of New Zealand, can it be said to have emerged from both Maori and Christian teachings? Of course, many indigenous communities have accepted the religion of their coloniser; Christianisation was used by colonisers as a principal means of gaining control over native populations (Cunneen 2003:187; 2004:345). Today in New Zealand, for example, statistics indicate that around half of Maori identify as Christians, and that many times more Maori identify as Christian or "Maori Christian" than subscribe to the traditional "Maori religion" (Statistics New Zealand 2002). Although it is not possible to extrapolate from these data the amount or extent of religious involvement or activity among Maori, or the significance of this pattern of religious affiliation, it is worth considering to what extent the perceived struggle of colonised populations for "traditional" restorative approaches to justice might be the struggle of colonised populations for *Christian* approaches to justice. This is important to consider given the role Christianity has played in the emergence of restorative practices in some localities (Allard & Northey 2001; Consedine 1995; Hadley 2001; Yantzi 1998:54), and the support of conservative religious groups for restorative justice (Braithwaite 2007:689; 2002:10).

Limited Political Power of Indigenous Peoples

It is surprising how frequently supporters of restorative justice portray restorative justice as having emerged in response to demands by - and/or on behalf of - indigenous communities, without considering the sociopolitical position of many such communities, and their corresponding (in)ability to affect change in this regard.

Around the world, colonised peoples have been found to be significantly disadvantaged in social, economic and political terms, experiencing poor health and living conditions, high mortality rates, impeded access to education and employment opportunities and widespread drug and alcohol abuse

(see Trees 2004:7-10 on one Australian context). Of course, there are significant differences among various indigenous populations, with some having made greater advances in rectifying these problems than others. Nonetheless, indigenous cultures are usually massively over-represented in criminal justice systems; this is particularly the case in Australia (Ogilvie & Van Zyl 2001:1).

It therefore seems problematic to assume that suggestions made by indigenous communities in relation to criminal justice practices would necessarily be considered by governments. This is not to suggest that there is no link between the practices of indigenous communities around the world and the emergence of restorative justice. On the contrary, it appears that in the context of decolonisation, a space is opened up in which novel initiatives targeting social problems are able to be considered. In this context, the implementation of restorative justice becomes a possibility. This, however, is a far cry from the cause-and-effect argument often made by proponents of restorative justice, and suggests instead a more nuanced account. In this sense, therefore, the suggestions of indigenous communities in regards to criminal justice need to fall within legitimated political rationalities.

As Cunneen (2003:186) argues, restorative justice is an example of the tendency of governments to adopt aspects of indigenous culture that are compatible with broader governmental aims, while disregarding other aspects that are seen as inimical to it. For Roach (2000:274-275) and Blagg (2001:227), this is further reflected by governments' focus on criminal justice, without consideration of wider economic and social issues. The focus on criminal justice 'has the potential to deflect attention that might be devoted to other aspects of self-government including land and resource claims, health care, unemployment, and poverty' (Roach 2000:275). The drive to implement restorative justice programs in indigenous communities might therefore be viewed as a strategy that seeks to further specific governmental aims, rather than comply with the demands of these communities (see also Cunneen 2002:43).

Making Restorative Justice Culturally Appropriate

A number of authors in the restorative justice field have contributed to debate about the cultural appropriateness of restorative practices. Typically, discussions have focused on the *in*appropriateness or inadequacy of restorative procedures for indigenous populations (Blagg 1998; Cunneen 1997, 2004; Pratt

1996; Tauri 1999; Tauri & Morris 2003) or on ways to make restorative practices more culturally appropriate for indigenous peoples (Wundersitz 1996:116-118). For many critics, restorative justice initiatives represent governmental attempts to "indigenise" existing non-indigenous systems, rather than truly recognising native customs (Blagg 1997, 1998; Cunneen 1997, 2002; Tauri 1999).

This debate raises important issues for the restorative justice project; inadvertently, it also destabilises the historical claim that restorative justice has emerged from and/or for indigenous communities. While attempts to make criminal justice reforms culturally appropriate may be laudable, they indicate that the over-riding focus is on "indigenising" existing criminal justice measures rather than genuinely adopting indigenous customs. Consider in this regard the following remarks made by New South Wales' then Minister for Community Services, Ron Dyer. Describing the progress of the emerging youth justice conferencing scheme in New South Wales in 1997, Dyer instructed the Parliament that two experts from New Zealand had been brought to New South Wales to assist in the implementation of the program:

> As well as speaking with juvenile justice officers, both men talked with a range of Aboriginal groups about the benefits of youth justice conferencing. They will also help the Department of Juvenile Justice to develop plans for youth justice conferencing to take into account the cultural needs of Aboriginal young people and their families (New South Wales Legislative Council 1997:294).

In a similar scenario, the then New South Wales Premier Bob Carr, in detailing to Parliament the introduction of a circle sentencing program in the town of Nowra, stated: 'the program originated within the Indian community in Canada 10 years ago. The New South Wales Aboriginal Advisory Council recommended we try it here. The Aboriginal people of Nowra welcome the opportunity' (New South Wales Legislative Assembly 2001:17618). Fry's (1997:19) report of the Northern Territory's pilot conferencing scheme similarly reveals that one location for the pilot, Yuendumu, was chosen as it had a strong Aboriginal Council which was 'receptive to the initiative'.

In these examples, it is clear that while the implementation of restorative justice measures represents attempts to "do something" to rectify problems faced by indigenous Australians in the criminal justice system, this took place without reference to any consideration of adopting indigenous traditions. While it

is commendable that indigenous groups have been consulted about these initiatives, it appears that these examples represent instances of an "indigenisation" of non-indigenous criminal justice processes rather than the recognition of indigenous customs. In addition to raising a range of issues in relation to the implementation of restorative justice in indigenous communities, discussion of the cultural (in)appropriateness of restorative processes problematises the celebrated claim that such practices represent time-honoured indigenous traditions.

Importantly, many of these attempts to make criminal justice practices culturally appropriate for indigenous people have been heavily criticised, or rejected outright, by members of indigenous communities (Pratt 1996:152). Tauri (1999:164) claims, for example, that during the decade since family group conferencing had been implemented in New Zealand, there had been no significant decrease in Maori dissatisfaction with the criminal justice system. Indeed, at the conclusion of a three-day *hui* [meeting] held to evaluate the Maori relationship with the justice system, 'many were calling once again for Maori to establish their own systems of justice and to deal with their own offenders in ways *they* define as appropriate [italics in original]' (Tauri 1999:164).

Conclusion

The historical analysis of restorative justice presented here might be seen as a contribution to the existing body of research that critiques restorative justice for its limited relevance to indigenous communities. It indicates that historically-speaking, the relationship between the emergence of restorative justice and the customs of indigenous peoples is more nuanced than many proponents allow.

This analysis does not intend to minimise the role of indigenous individuals and communities in the development of restorative justice practices, where this has occurred. Rather, it seeks to destabilise the powerful and legitimating history of restorative justice that proponents who reiterate the indigenous antecedents of restorative practices simultaneously create and endorse. As I have argued elsewhere (Richards 2007), the claim that restorative justice represents an indigenous mode of responding to deviant behaviour renders restorative justice a technology of governance that is deemed appropriate for dealing with indigenous juveniles and adults in contact with the criminal justice system. As O'Malley

(1994:138) points out, such techniques are usually underpinned by good intentions on the part of policymakers, but can result in the unfair or inaccurate use, marginalisation, or skewed interpretation of indigenous traditions in accordance with existing governmental aims.

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